THE NEW YORK TIMES, SATURDAY, MAY 12, 1973

C 15

Intrusion of Executive Branch Into Judicial Process

Trial Provided an Insight Into

But Sudden End Leaves Vital Issues Unresolved

Special to The New York Times

LOS ANGELES, May 11—In an era of courtroom spectaculars, the Pentagon Papers trial became one of the most spectacular of all.

This was so not only because of the issues that it raised but also because Daniel Ellsberg and Anthony J. Russo Jr., the defendants, did not contest the facts of the case: that Dr. Ellsberg removed the Pentagon papers from the Rand Corporation and that he and Mr. Russo copied them.

It started as a major test of the First Amendment to the Constitution, of the Government's authority to control information and of the public's access to that information.

And although the manner of the trial's conclusion left those constitutional issues largely unresolved, the denouement proved once again, in dramatic fashion, that finally truth is an army too many to turn back.

For in the last week of the trial, in a series of disclosures no novelist could invent, the Government admitted, chapter by chapter, the intrusion of the executive branch into the judicial process to a degree possibly unparalleled in American history.

Break-In Disclosure

There was, for instance, on the 80th day of the trial, the disclosure that the office of Dr. Ellsberg's former psychiatrist had been broken into in an effort to obtain his "psychiatric profile," and that this had been done by a team of five persons led by E. Howard Hunt Jr. and G. Gordon Liddy, convicted Watergate conspirators who were operating then out of the White House.

This was quickly followed by other, even more stunning disclosures, all of them reluctantly offered. John D. Ehrlichman, resident Nixon's former chief adviser for domestic affairs, said that acting on the President's orders he had directed an ex officio White House investigation into the public release of the Pentagon papers, then into Dr. Ellsberg's background.

That investigation led to the break-in, and two of Mr. Ehrlichman's White House associates, Egil Krogh Jr. and David Young, were forced by the disclosure at this trial to quit Government service. Then Charles W. Colson, former special counsel to the President, admitted that he, too, knew about the break-in, but was told by Mr. Ehrlichman and John W. Dean 3d, the President's counsel, never to mention it because it had been done to protect national security.

Mr. Colson said that he had learned of the burglary and told no one, though he was assigned originally by the President to investigate the Watergate scandal. And it was revealed, at this trial, that Mr. Colson also ordered one of the burglars, Hunt, to forge State Department cables to directly implicate President Kennedy in the assassination of Premier Diem of South Vietnam.

Further, the trial showed that contrary to law, the Central Intelligence Agency does in fact operate clandestinely within the borders of the United States. Marine Corps General. Robert Cushman admitted that the burglary was committed on Sept. 3, 1971, with equipment and disguises supplied by the C.I.A., although the C.I.A. insisted it had not known a burglary had been planned.

At the time, General Cushman, now Commandant of the Corps and a member of the Joint Chiefs of Staff, was deputy director of the C.I.A.

Disclosure by Judge

And in the midst of all these disclosures, the trial judge, Matthew R. Byrne Jr., admitted in answer to a question put to him by Charles R. Nesson, a defense counsel, that twice last month he met with Mr. Ehrlichman to discuss the possibility of becoming director of the Federal Bureau of Investigation.

Perhaps, too, the trial demonstrated that there exists even in government an inner dramatic tension similar to that of a finely written play. For former Attorney General John N. Mitchell, the man who ordered the prosecution of Dr. Ellsberg and Mr. Russo—the prosecution which led to many of the disclosures that embarrassed the Administration — has himself been indicted in an unrelated, campaign contribution case.

There was even a counterpoint to this: the promotion of two Government witnesses in this case. They were J. Fred Buzhardt, general counsel of the Defense Department, who was moved to the White House staff, and Army Gen. Alexander M. Haig Jr., another Government witness, who was made Chief of Staff of the White House staff.

The Pentagon papers are a 47-volume "top secret-sensitive" study of America's involvement in Southeast Asia. It was compiled by a special Vietnam History Task Force set up in the Defense Department by Robert McNamara, then Secretary of Defense, on June 17, 1967. The study was actually completed on Jan. 15, 1969, shortly before Clark Clifford left the office of Secretary of Defense.

The saga of the Pentagon

"All the News That's Fit to Print"

The New York Times

LATE CITY EDITION
Weather: Chance of showers today, tonight. Partly sunny tomorrow. Temp. range: today 74-94; Wed. 72-91. Temp. Mum. Index yesterday
Full U.S. report on Page 94.

VOL. CXX ... No. 41,431 © 1971 The New York Times Company NEW YORK, THURSDAY, JULY 1, 1971 15 CENTS

SUPREME COURT, 6-3, UPHOLDS NEWSPAPERS ON PUBLICATION OF THE PENTAGON REPORT; TIMES RESUMES ITS SERIES, HALTED 15 DAYS

Nixon Says Turks Agree To Ban the Opium Poppy

PRESIDENT CALLS STEEL AND LABOR

Pentagon Papers: Study Reports Kennedy Made 'Gamble' Into a 'Broad Commitment'

BURGER DISSENTS First Amendment Rule

Headline on the front page of The New York Times of July 1, 1971, when the U.S. Supreme Court made ruling

papers actually started on the morning of Sept. 30, 1969, when Dr. Ellsberg telephoned his friend Mr. Russo and asked if he knew anyone with a Xerox machine. Mr. Russo said he did, and that evening Dr. Ellsberg removed portions of the Pentagoon Papers from the Rand Corporation in Santa Monica, where he was employed. Along with Mr. Russo and several others he started copying them. It took about eight sessions, lasting intoo November, to finish the job, Dr. Ellsberg testified.

F.B.I. Knew But Didn't Act

It is now known that by April, 1970, at the latest, and probably much earlier — even perhaps in October, 1969—the F.B.I. knew that Dr. Ellsberg was copying "top secret-sensitive" documents, but took no action against him.

In this trial he and Mr. Russo were originally accused of stealing and copying 18 volumes of the Pentagon papers, plus two other "top secret" documents — eight pages of a 1969 Joint Chiefs of Staff memorandum and a 1954 Geneca Accords memorandum. The judge later precluded the Geneva Accord memorandum from the trial.

The Pentagon papers were first disclosed to the public in The New York Times on June 13, 1971. On June 15, for the first time in American history, a newspaper of general publication, The Times, was restrained by prior court order from publishing articles—about the Pentagon papers.

In ordering The Times to halt publication of the material, United States District Judge Murray I. Gurfein said that any temporary harm done to the newspaper by his order was "far outweighed by the irreparable harm that could be done to the interests of the United States" if more articles and documents were published while the case was in progress.

The new day, June 16, 1971, the Justice Department asked Judge Gurfein to order The Times to turn over for the Government's inspection the secret entagon study from which its Vietnam series was drawn. But, Judge Gurfein later withheld action on the Government's demand. Instead, The Times gave the court and the Justice Department a list of descriptive headings for those portions of the Pentagon archive in The Times's possession.

On June 18, The Washington Post in its late editions of that day began what it described as a series of articles based on "sections" of a Pentagon study "made available to The Washington Post" and the articles were distributed by The Washington Post-Los Angeles Times News service and decribed by The Associated Press and United Press International.

The next day Judge Gurfein refused to enjoin The New York Times from publishing more articles based on the secret Pentagon study, declaring that the press must be free to print sensitive matter even if it embarrassed the Government.

However, publication was blocked by Judge Irving R. Kaufman of the United States Court of Appeals. On June 23, the appeals court held that The Times could resume publication of its series but could not use any material that the Government contended was dangerous to national security. The Times appealed to the Supreme Court the next day.

The restraint was lifted on June 30, 1971, by the Supreme Court, in a 6-to-3 ruling, but that ruling left important Constitutional questions unresolved, particularly the question of freedom of press under the First Amendment. It was left somewhat blurred by the fact that the case drew nine separate opinions from the Justices.

But the publication of the Pentagon papers in The Times set off another chain reaction. Dr. Ellsberg was arrested on June 25 on the eve of the oral arguments in the Supreme Court. He was charged with espionage. Later, in December, 1971, he was reindicted, and the charges against him then were greatly expanded.

Swarms of F.B.I. agents and Air Force investigators descended on the Rand Corporation to interview employes and officials, and to find out what other "top secret" documents, if any, had been taken. A similar investigation shook up the Pentagon itself.

In the White House, President Nixon ordered the creation of his ex officio task force to investigate the leak, and nearly two years later Mr. Colson recalled that at the time there were many White House meetings about the disclosure —"kind of panic sessions," he called them.

Second Jury Selected

The trial began on Jan. 3, 1973, with the start of selection of a second jury, the first having been dismissed because of a four-month delay over a previous wiretap argument.

The Government had charged the defendants with espionage, theft and conspiracy covering a period between March 1, 1969, and Sept. 30, 1970—nine months to more than two years before the papers were fist made public in The Times.

The broad constitutional issues involved were those of the First Amendment, for the Government was, in essence, charging Dr. Ellsberg with the theft of information, and with conspiring to deprive the Government not of materials—for the copied documents were returned—but of the information in those documents.

And, in a country where there was no Official Secrets Act, the Government was contending, for the first time, that the disclosure of information classified as "top secret" violated the espionage laws even though that information was not given to a foreign power.

Indeed, there is no law, only Executive orders, pertaining to the disclosure of classified information. And so, legal authorities said, the Government was trying to make a jury create law where no Congressional statutes existed.

These legal authorities say that the way the trial ended—not by a jury verdict but because of legal technicalities—has left those constitutional issues unresolved.

The defense did try through the 89 days of the trial to litigate the war in Vietnam, and, for the most part, failed; it tried, too, to test the classification system, and, again, because of the judge's rulings, it failed.

But the American people were, through this trial, given a considerable insight into the intelligence-gathering methods of the United States.

There was weighty testimony, for instance, on how intelligence analysts do their work; and there was testimony about agents in the field, and about the wiretapping by intelligence agencies of even the heads of state.

The jury was told about the inner working of secret diplomacy, about spy equipment in the sky, and even about infra red equipment that picked up the warmth of human beings at great distances and, therefore, was useful in detecting enemy troops in the field.

All this was developed to combat the Government's contention that disclosure of the papers could, in fact, have damaked the national security of the United States.

It was essential for the Government to prove this to convict the defendants on the espionage charges outstanding against them. But that issue was never resolved.